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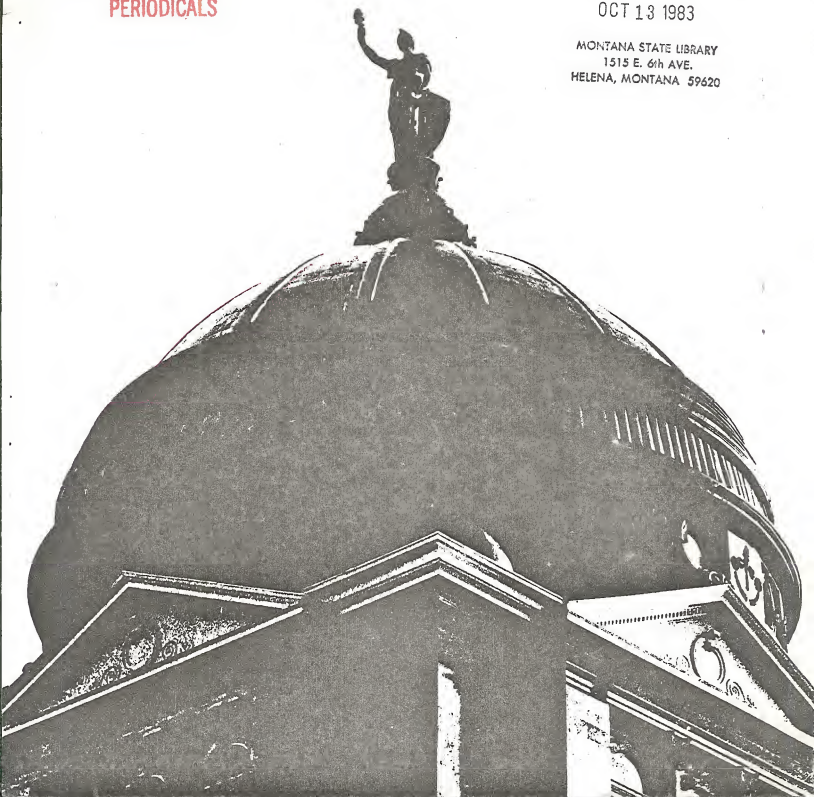


INTRODUCTORY NOTES AND COMMENTS

ELECTION AND COMMITTEE ASSIGNMENTS

At the annual MCAA convention at Fairmont Hot Springs from July 20 to July 23, 1983 the following persons assumed the offices or assignments designated as a result of election or appointment and will hold such offices until the 1984 convention.

OFFICERS

Jim Seykora	President
John Pratt	1st Vice-President
John Flynn	2nd Vice-President
Ed Laws	3rd Vice-President
Bob McCarthy	Treasurer
Don Ranstrom	Secretary

DIRECTORS

Allin Cheetham	Loren Tucker
Ted Lympus	Keith Haker
Denzil Young (NDAA Rep.)	Dick Simonton

LEGISLATIVE COMMITTEE

Ed Laws	Mike McGrath
Rae Kalbfleisch	Ed McLean
Harold Hanser	

TRAINING COMMITTEE

Marc Racicot	MCAA Officers

CONVENTION SITE COMMITTEE

Jim Seykora	Ted Lympus
Ron Smith	

JAIL STANDARDS COMMITTEE

Russ Andrews	Allin Cheetham
Loren Tucker	

GAMBLING COMMITTEE

Don Ranstrom	Duke Gilbert
Loren Tucker	

NOMINATING COMMITTEE

Jim McCann
Denzil Young
Ed Laws

PROSECUTOR'S HANDBOOK COMMITTEE

Dusty Deschamps
Jim Seykora
Duke Gilbert
Gerry Higgins

WINE COMMITTEE

Ed Laws
Bob McCarthy
John Pratt

1984 CONVENTION DATES

July 25 - 28, 1983

DEPUTY COUNTY ATTORNEY SURVEY

Several Association members requested that this office attempt to compile information concerning deputy county attorneys. As a result, on August 4, 1983 a survey form was sent to all Montana County Attorneys to be completed and returned. Twenty-three counties have responded. Without a broader base of information, the results of the survey are hardly worth tabulating. If you have not done so already, please complete and mail the deputy county attorney survey form to Karen Ferreira, County Prosecutor Services Bureau, Justice Building, 215 North Sanders, Helena, Montana 59620.

PROSECUTION STANDARDS FOR CHILD SEXUAL ABUSE CASES

A copy of the standards formulated and promulgated by the Yellowstone County Attorneys Office for use in child sexual abuse cases is enclosed.

HOPE AND EXPECTATION

A reprint from the Washington Prosecutor Newsletter follows:

THE KOREAN MASSACRE AND THE WORK WE DO: THE CRITICAL DIFFERENCE BETWEEN HOPE AND EXPECTATION

The astonishing thing about the recent tragedy is that so many people were astonished that the Russians would do such a thing -- One fatuous sentator wasn't sure if he should disregard the pious professions of interest in peace he'd gotten in Moscow the previous week. Yeed's experience in 1964 on an Army chopper which the Russians tried to suck over the border by imitating Grafenoehr Army Air Base control tower has doubtless spoiled his objectivity about a

nation described by Kipling as "the bear that walks like a man" -- at any rate it's clear that they do not share our values or moral standards. We can hope that relations/ treaties/actions will work but we'd be fools to expect that result. There are, however, all sorts of folks who believe/ expect that these folks are just like us -- the intensity of their desire for a result leads to conviction that it will come to pass if we just . . .

The work we do involves a similar problem. Brer Furman opined that prosecution "is not for the faint of heart" (or sensitive of stomach) given the examples of human depravity we encounter as a matter of semi-routine which are totally inconsistent with the ideals that we, and the public, hold for our species. We know that three-year-olds are subjected to sexual abuse by adults who should be protecting them, that young men will callously execute 13 potential witnesses to escape punishment, that a 20-year-old woman will do Lizzie Borden one better by torching the residence after she's murdered her parents, etc., etc. Most people, fortunately aren't confronted with those realities and will see them only as jurors and therein lies the rub. Folks who expect rather than hope that their fellows follow the law get a bit numbed when confronted with evidence to the contrary. "Surely, the well scrubbed defendant is telling the truth and the mysterious stranger did it. After all, this person before us wouldn't (insert your own horror story)."

The issues of how we maintain our ideals and how the sordid reality we work with affect our expectations are best reserved for other times and places. Suffice it to suggest that Henry Jackson saw and worked in our world, admittedly at a gentler time, saw the Nazi death camps first hand and maintained a mental equilibrium that enabled him to function effectively, motivated to make hopes a reality without falling prey to unfounded expectations. He did so for his constituents, his country and the world.

FALL TRAINING

Scheduled for December 8 and 9, 1983 at the Sheraton in Billings. The final program of instruction has not been finalized. Upon completion county attorneys and deputies will be notified. It is expected that the program will be designed for approximately ten hours of CLE credit.

RECENT CASES AND NOTES

RIGHT TO COUNSEL - BAN ON COMMUNICATIONS DURING SHORT RECESS

No violation of the right to counsel was found in a trial judge's order forbidding a defendant and his counsel to communicate during a brief recess immediately following the defendant's direct examination. The Court distinguished Geders v. U.S., 425 U.S. 80 (1976), in which the recess was an overnight one lasting about 17 hours. The Supreme Court in Geders stressed that during an overnight recess "an accused would normally confer with counsel." In contrast, a defendant and his counsel are generally not permitted to confer between the defendant's direct and cross-examination, and a continuance for the purpose of permitting such a huddle would normally be denied. State v. Perry, 299 S.E.2d 324, (S.C., 1983).

ARREST - WHAT CONSTITUTES - ASKING QUESTIONS OF DEPLANING AIR PASSENGER - DIRECTIVE TO FOLLOW POLICE OFFICER'S CAR TO STATIONHOUSE - PICKING UP YOUTHFUL SUSPECT

A deplaning air passenger was not "seized" by a DEA agent when the agent displayed his credentials and asked the passenger's permission to question him. The Court believed that a reasonable person under similar circumstances would have felt free to ignore the agent and proceed on his way. The Court rejected a per se rule that every contact between a citizen and law enforcement officer constitutes a "seizure." While the average citizen may decide to stop and respond to a law enforcement officer's questions due to a sense of common courtesy, this does not mean that the citizen is actually or constructively restrained by the officer's authority. Here there was no evidence that the agent used a threatening tone of voice, displayed a weapon, or assumed an overbearing manner. U.S. v. Collis, 699 F.2d 832 (6th Cir., 1983).

Where a police officer directed the occupants of a vehicle to follow him to a police station, this constituted an arrest for Fourth Amendment purposes, and where there was no probable cause at the time of the directive, and no voluntary action on the part of the defendants, all evidence produced as a result of the illegal arrest was tainted. People v. Reynolds, ___ N.E.2d ___, 32 CrL 2442 (Ill. 1983).

SEARCH INCIDENT TO ARREST - THE SECOND SEARCH

Resolving the issue of the "second search," the Ninth Circuit Court of Appeals had held that if police have lawfully seized and searched an item in a person's possession, they may conduct subsequent searches of the item without a warrant, provided they have maintained legitimate possession of it in the meantime. A defendant's Fourth Amendment right against unreasonable searches and seizures was not violated by a warrantless search of her purse at the police station, in view of the fact that a lawful search of the purse had previously been conducted at the time of arrest. The initial search was lawful as incident to the arrest and defendant's expectation of privacy was significantly reduced by that search. No additional protection of privacy would be provided by requiring police to procure a warrant for searches of items already searched. U.S. v. Burnette, 698 F.2d 1038 (9th Cir., 1983).

INVENTORY SEARCHES - SECOND LOOK - RIGHT TO PRIVACY

There is no reasonable expectation of privacy in personal effects that police have legitimately viewed, inventoried, and stored. Thus, a detective's warrantless "second look" at property whose significance as evidence was not appreciated when it was originally inventoried and stored by a jailer in another jurisdiction was entirely proper. The detective knew that a distinctive necklace had been taken in a burglary he suspected the defendant of having committed. He also learned that a necklace was among the items of property taken from the defendant upon his arrest and incarceration in a neighboring county. The detective brought the crime victim to the jail, retrieved the necklace from the property envelope in which it had been placed, and allowed the victim to identify it. Under these circumstances, the defendant had no protected expectation of privacy. People v. Richards, ___ N.E.2d ___, 32 CrL 2398, (Ill., 1983).

MIRANDA - EMERGENCY EXCEPTION

An emergency exception to Miranda has been recognized "where questioning is necessary to insure the safety of the police, the officers, or the accused and time is a crucial factor." Here, a demonstrator in front of a courthouse told the police that he had a bomb buried in the lawn. Without reading him his Miranda rights, the police asked him about the bomb, its location, and how it could be detonated. In refusing to find a Miranda violation the Court stressed that emergency exceptions have been recongized by the U.S. Supreme Court in the Fourth Amendment context, and there was no reason why the same should not be true when the Fifth Amendment is involved. The requirements of such an excep-

tion are that the questioning be aimed at dealing with the emergency, not at obtaining evidence, and that the exception last no longer than the emergency itself. Cronk v. State, 443 N.E.2d 882 (Ind. App., 1983).

STOP AND FRISK - ROCK CONCERT PATRONS - ALTERNATE PROCEDURES

There is no "rock concert" exception to the Fourth Amendment's warrant requirement, under which police can frisk all patrons of rock concerts in public facilities. The State attempted to analogize such frisks to searches performed in airports and courthouses, but the Court found this logic to be unpersuasive. Concert patrons' carrying of alcohol, explosives, firearms, and controlled substances into concerts does cause serious problems, but the dangers are considerably less than those resulting from the bombings and other terrorist activities at which airport and courthouse searches are aimed, and the Court noted that, "in contrast to the high degree of intrusion in the pat-down frisk employed by Seattle police, both airport searches which are conducted with a magnetometer and courtroom searches which employ a brief stop and a visual examination of packages, pocketbooks, and briefcases are far less intrusive." The Court also suggested that some less intrusive means for serving law enforcement interests in minimizing problems at such events could be found. "Parcels, bundles, knapsacks, and pocketbooks over a certain size could be banned from the Coliseum with appropriate notices to that effect on the premises and on the tickets. Checkrooms with appropriate fees could be established for these items. * * * Without passing at this time on the constitutionality of such measures, the City might establish less intrusive and more formal procedures for determining the presence of contraband. * * * Festival seating (no reserved seating and usually no seats at all on the floor of the arena) could be banned." Jacobsen v. City of Seattle, 658 P.2d 653 (Wash., 1983).

MIRANDA - WAIVER - RIGHT TO REMAIN SILENT - REQUEST TO TURN OFF TAPE RECORDER

Merely because a defendant in custody asked a police officer to turn off a tape recorder did not constitute an invocation of the right to silence, where the defendant had first told the police officer that he "want[ed] to talk to you" and indicated that he understood the Miranda warnings. The defendant also stated: "I wish you'd turn that off for me cause this has nothing to do with this crime" and "if you'd shut that thing off for a minute I could tell you something but I ain't, I ain't gonna say it on that." In response the officer said the recorder had to be kept on in order "to protect both of them." The Court noted that the

MIRANDA - (CONT.)

defendant continued his confession and concluded: "[i]f he had intended to assert his right to remain silent, he could simply have declined to talk further." State v. Graham, ___ P.2d ___, 32 CrL 2454 (Ariz., 1983).

MIRANDA - WAIVER - RIGHT TO COUNSEL - LAWYER'S PRESENCE

It has been held that even after a defendant ostensibly waived his right to counsel, when his attorney shows up at the police station during interrogation, the police must inform the defendant of his presence, and there can be no intelligent and knowing waiver of the right to counsel if they fail to do so. The Court considered it improbable that a defendant, who may be indifferent to an abstract offer of counsel, and may waive his Miranda rights, would reject an opportunity to consult with an attorney "waiting to see him then and there." The Court ruled that if the police "intentionally or negligently" fail to tell a suspect of his attorney's presence, any statement subsequently obtained by the police or any evidence derived from such a statement, will be inadmissible. Moreover, it is not necessary that the interrogating officers themselves actually know of the attorney's presence. To trigger the duty of the police to inform the defendant of counsel's availability, the attorney must present himself at the interrogation site and have a legitimate right under the Code of Professional Responsibility to hold himself out as the suspect's counsel. Weber v. State, ___ A.2d ___, 32 CrL 2443 (Del., 1983).

WITNESS - HYPNOTICALLY REFRESHED TESTIMONY - ADMISSIBILITY

The Supreme Court of Wisconsin has held that hypnotically refreshed testimony is admissible at a criminal trial, so long as the hypnosis session is shown not to have been impermissibly subjective and the opponent of the evidence is allowed to produce expert testimony on what hypnosis does to the subject's recall. The Court takes the position that the issue in these cases is not the reliability of hypnosis itself, but "the effect of a specific hynotic session." No violation of a party's right of confrontation exists in such cases because the witness can be cross-examined about his prehypnosis recollection and evidence can be introduced on the effect of hypnosis on memory. The question whether hypnotically refreshed testimony should be introduced in a given case should be decided at a pretrial hearing, where the proponent has the burden of demonstrating a lack of impermissible suggestiveness. State v. Armstrong, 329 N.W.2d 386 (Wis., 1983).

EXPERT WITNESS - RELIABILITY OF EYEWITNESS TESTIMONY - ADMISSIBILITY

The Supreme Court of Arizona has held that a defendant whose trial turns solely upon his identification by eyewitnesses may be entitled to introduce expert testimony on the problems associated with eyewitness testimony. The expert's testimony could have given the jury significant help on several substantive issues in this case: for example, testimony about the rate at which a person forgets could have helped the jury choose between an identification made soon after the crime and another made much later. Under the facts of this case, the testimony would have been of such great assistance to the jury that any possible prejudice to the prosecution was outweighed, and exclusion of the evidence amounted to an abuse of the trial court's discretion. Such evidence is often excluded as not a "proper subject" for expert testimony, on the ground that ordinary jurors know the dangers of eyewitness identifications. The defense arguments here, based on theories espoused by the proffered expert, ran counter to common sense assumptions; thus, the trial court's exclusionary ruling forced the defense to argue without evidentiary foundation. At the same time the Court stressed that it will continue to support trial court rulings in the great majority of cases that come before it on this issue. State v. Chapple, ___ P.2d ___, 32 CrL 2418 (Ariz., 1983).

EXPERT WITNESS - FAMILY CHILD SEX ABUSE SYNDROME - ADMISSIBILITY

The Supreme Court of Oregon has accepted expert testimony concerning the reactions of young victims of intrafamily sexual abuse. In this case such evidence was admissible at the trial of a defendant who allegedly raped his fourteen-year-old daughter. The State used the testimony to explain statements, introduced by the defense, in which the alleged victim said she had lied about the rape. The experts testified that in intrafamily sex abuse cases, the youthful victim often feels guilty about testifying and thus retracts a claim of abuse. This phenomenon is generally unknown to jurors and could help them evaluate the victim's credibility as a witness. The danger that the jurors will put too much trust in the expert's evaluation is not so great as to require exclusion of such testimony. Thus, the jury should hear both how incest victims typically react and also the expert's judgment on whether the victims in the case at bar fits the pattern. State v. Middleton, 657 P.2d 1215 (Ore., 1983).

WARRANTLESS ARREST - PROBABLE CAUSE HEARING - DELAY

A California county has been ordered by the Ninth Circuit Court of Appeals to adjudicate probable cause in criminal cases within 24 hours of a warrantless arrest, or establish exigent circumstances that would obviate the need for such a determination. The County had a policy in incarcerating persons arrested without a warrant for 48 hours or longer before there was a judicial determination of probable cause. This policy could not be squared with the decision in Gerstein v. Pugh, 420 U.S. 103 (1975) in which is was held that detention beyond what is needed for administrative processing incident to arrest requires a determination of probable cause by a neutral magistrate. It appeared that, in fact, the local authorities needed no more than 10 hours after arrest to take care of administrative details. Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983).

WARRANTLESS SEARCH - EVIDENCE OF RESISTANCE

There is no constitutional right to physically resist a peaceful "pat down" search by a person who knows, or has good reason to know, that the person doing the searching is an authorized police officer performing his duties. Evidence of such resistance is admissible at the suspect's trial, but a verbal refusal to consent to a search is not admissible because this would inhibit the exercise of Fourth Amendment rights. The "no resistance" rule is applicable even if the search turns out to be illegal. Elson v. State, 659 P.2d 1195 (Alaska, 1983).

WARRANTLESS SEARCH- EXIGENT CIRCUMSTANCES - AVAILABILITY OF TELEPHONIC WARRANTS

It has been held that in evaluating a claim of exigent circumstances involved in a failure to obtain a search warrant, the availability of a telephonic warrant must be taken into consideration. In this case federal drug agents made no attempt to obtain such a telephonic warrant, but the Court found that the time available to preserve evidence was so short as to justify the agents in securing the defendant's residence with no warrant, telephonic or conventional. The drugs were subject to being easily and quickly destroyed, and the facts indicated that the defendant was likely to suspect police involvement within a short time. Although the Court approved the warrantless search, a dissenter argued forcefully that the Government should have demonstrated at trial how long it would have taken to obtain a telephonic search warrant. U.S. v. Cuaron, 700 F.2d 582, (10th Cir., 1983).

WARRANTLESS SEARCH - AUTOMOBILES - OPENING HOOD TO CHECK PARTS

By lifting the hood of an automobile "to check if any of the engine parts were stolen," with no reason to suspect that a crime involving the car had been committed, a police officer violated the Fourth Amendment rights of the car's owner. The Court confirmed the position it apparently took in State v. Agnasan, 614 P.2d 393 (Hawaii, 1980), that checking an engine number which is located inside the vehicle constitutes a search under the Fourth Amendment and the State Constitution. State v. Moore, 659 P.2d 70 (Hawaii, 1983).

MIRANDA - WAIVER - RIGHT TO COUNSEL - AMBIGUOUS STATEMENTS

A suspect's statement during custodial interrogation, "I think I should call my lawyer," was "ambiguous" and did not constitute invocation of the right to counsel under Miranda. The defendant made the statement after being given Miranda warnings and after having made several admissions. After making the ambiguous statement about his lawyer, the police stopped their questioning and gave defendant a telephone, but he kept on making incriminating statements. After several minutes, the officer asked defendant if he wanted "to talk about it;" he answered "yes," and proceeded to confess to the crime. "In these circumstances, the defendant's remark was ambiguous, the court determines. The officer's further question was designed to clarify the defedant's wishes, not to evoke an incriminating response. Also, the defendant's affirmative response to the officer's inquiry about further questioning indicates that the first remark was not an invocation of the right to counsel. Thus, Miranda was not violated. [par.] Moreover, the court continues, even if the statement is properly construed as an invocation of the right to have counsel present, the defendant knowingly an intelligently waived that right. The written waiver he executed satisfied the requirements of Edwards v. Arizona, 451 U.S. 477 (1981)." Cannaday v. State, 427 So.2d 723 (Fla., 1983).

ROBBERY - GROWING OUT OF THEFT OR BURGLARY - MODEL PENAL CODE

Where a state follows the Model Penal Code, a theft or burglary charge can be elevated to robbery if the perpetrator inflicts bodily injury "upon another" or threatens "another" in the course of committing the offense. The instant Court interpreted the term "another" to encompass police officers who were attacked while investigating a burglary. The legislature's use of the expansive term "another" expressed its intent to focus on the defendant's conduct and not the victim's status. State v. Mirault, 457 A.2d 455 (N.J., 1983).

MIRANDA - WAIVER - RIGHT TO COUNSEL - EDWARDS V. ARIZONA

Where a suspect invoked his right to counsel during an interrogation by authorities from one jurisdiction, he could not later be questioned by officials from a different jurisdiction regarding another, unrelated crime. This violated Edwards v. Arizona, 451 U.S. 477 (1981), which requires that the defendant himself must initiate any further conversations with the police for there to be a valid waiver of the earlier invoked right to counsel. The facts indicated that the defendant had asserted his right to counsel during an interrogation by authorities in county "A". While still being held there, he agreed to talk to officials from county "B" regarding another crime, and eventually confessed. The prosecution contended that his confession was admissible under Michigan v. Mosley, 423 U.S. 96 (1975), which held that the police could question a suspect about one crime after he had exercised his right to remain silent during earlier questioning about an unrelated crime. The Court took the position that different standards govern protections afforded the right to remain silent and the right to counsel. The fact that the authorities in the second county were unaware of the defendant's previous request for counsel was irrelevant. Karr v. Wolff, 556 F.Supp. 760 (Ill. 1983).

CONTEMPT - COMPLAINANT'S REFUSAL TO TESTIFY - JUVENILE

A 15-year-old girl who had complained of being sexually assaulted by her adoptive father could be given a summary sentence of a week in jail after being found in direct criminal contempt of court when she refused to testify at the adoptive father's trial. Among other things, the Court ruled that all courts of record have inherent contempt power, and thus the minor's argument that only a juvenile court could punish her for contempt was rejected. Since the policy underlying contempt is to vindicate the dignity of the impugned court, the rehabilitative processes of the juvenile court have no bearing on the issue. Summary punishment was appropriate because the misconduct occurred in the open court and the length of the sentence was not an abuse of discretion. State v. DeLong, 456 A.2d 877 (Me., 1983).

WITNESS - OPINION EVIDENCE - EXPERIENCED POLICE OFFICER'S TESTIMONY CONCERNING POSSESSION OF NARCOTICS

The North Dakota Supreme Court held in State v. Morris, 331 N.W.2d 48 (N.D., 1983) that an "experienced, well-trained, and knowledgeable" police officer can give an opinion that a certain quantity of marijuana would normally be possessed for purposes of sale rather than personal use. N.D.R.Ev. 702, which is modelled after Fed.R.Ev. 702, permits opinion evidence by a witness qualified as an expert whenever scientific, technical, or other specialized knowledge will assist the trier of fact.

WITNESS - CROSS-EXAMINATION - CREDIBILITY - PSYCHIATRIC HISTORY

A trial court limit placed upon cross-examination regarding a witness' mental health has been found to constitute a denial of the defendant's Sixth Amendment right to confront adverse witnesses. The basic defense theory was that the witness had a vendetta against the defendants, and that her psychiatric history displayed a variety of manifestations of psychotic behavior indicating paranoia and a compulsion to manipulate others. The witness's mental condition was, therefore, highly relevant to the issue of her credibility. It was thus an abuse of discretion for the trial court to forbid broad cross-examination of the witness by the defense. It was also an abuse of discretion to deny the defendant access to the witness's psychiatric records, which were sought for the purpose of cross-examination. U.S. v. Lindstrom, 698 F.2d 1154 (11th Cir., 1983).

INSTRUCTIONS - REASONABLE DOUBT - QUANTITATIVE SCALE

Reversible error was committed by a trial court that attempted to describe "reasonable doubt" in its voir dire and jury instructions by using a numerical scale. During the voir dire, the judge referred to "a scale of zero to ten", placing the preliminary hearing standard of probable cause at about one, and the burden of persuasion in civil trials at just over five, and reasonable doubt at about "seven and a half, if you had to put it on a scale." In the jury instructions he referred to the scale again, stating, "It is not necessary that the defendant's guilt should be established beyond every doubt to an absolute certainty." This instruction would be permissible in its own right, but became, "reversible error when coupled with any other attempt to supplement, change, or clarify the statutory reasonable doubt definition." The scale illustration was bad because reasonable doubt is to be viewed as a qualitative, not a quantitative, concept. "Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." McCullough v. State, 657 P.2d 1157 (Nev., 1983).

MIRANDA - INTERROGATION - SUGGESTION OF COOPERATION AND POLICE STATEMENT OF DETAILS OF CRIME

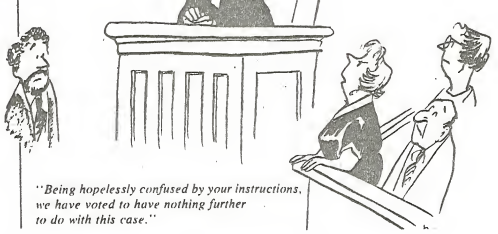
A defendant was not "interrogated" merely because a federal agent suggested that he consider cooperating with the authorities. By the same token, their giving him the details of the crime they suspected him of having committed did not constitute "interrogation," where the relation of the facts was at the defendant's own request. Thus, an incriminating statement blurted out by the defendant after hearing what the agents knew about the crime was admissible as a voluntary statement. U.S. v. Guido, 704 F.2d 675 (2nd Cir., 1983).

INSTRUCTIONS - TIME FUSE CHARGE

Where a deadlocked jury was told it had 15 minutes to reach a verdict or else a mistrial would be declared, this was potentially coercive and denied defendant a fair trial. The Court noted that this "time fuse" instruction may have a coercive effect "because it orders the jury to end its deliberations with a verdict or have a mistrial declared." The arbitrary 15-minute deadline may have prevented the jury, which subsequently found the defendant guilty, from reaching a well-considered verdict. At the same time, the Court refused to impose a per se ban on time deadlines for returning verdicts. "[T]he better approach utilizes a case-by-case examination of the particular facts of each case where the instruction is given." However, such instructions should be given with great caution. Allen v. People, ___ P.2d ___, (Colo., 1983).

SPEEDY TRIAL BALANCING TEST ADOPTED FOR DELAY IN FORFEITURE CASES

In an 8-1 decision the Court ruled that an 18-month delay in instituting forfeiture proceedings against currency seized by customs inspectors did not violate due process principles. The Court adopted the speedy trial balancing test first articulated in Barker v. Wingo, 407 U.S. 514 (1972) and ruled that it is to be applied in forfeiture cases. Using the Barker test, the delay in the filing of the forfeiture action was not so unreasonable that it amounted to a violation of due process, although the length of time was "quite significant." In spite of this unusual delay, the Court was persuaded that the reasons were sufficient to justify it, i.e., the pendency of an administrative remission procedure and of criminal charges. In addition, the claimant did not pursue all possible avenues for recovery of her money, and no prejudice resulted from the delay. A lone dissent was filed by Mr. Justice Stevens. United States v. $8,850 in U.S. Currency, 103 S.Ct. 2005, 33 CrL 3099 (May 23, 1983).



"Being hopelessly confused by your instructions, we have voted to have nothing further to do with this case."

AGUILAR-SPINELLI RULE FOR PROBABLE CAUSE REPLACED - GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE DEFERRED

Although all eyes were on this case to see if the Supreme Court would adopt a good faith exception to the exclusionary rule, the Court took the opportunity instead to ease the rule on use of informer tips in establishing probable cause for search warrants. The test now is the "totality of the circumstances." The former rule required a two-part consideration: (1) the application for a warrant had to set forth the "underlying circumstances" to enable the judge to determine the validity of the informant's information; and (2) the officers making the application for a warrant had to support their claim that the informer was reliable. Although these factors are no longer to be applied in a mechanical fashion, they are still important as part of the "total circumstances."

"The legal test, developed from Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), for evaluating the sufficiency of search warrant affidavits based on informers' hearsay is disapproved and replaced with a 'totality of the circumstances' test in which the reliability and credibility of the informer and his basis of knowledge are considered as intertwined considerations that may illuminate the probable cause issue, rather than as strictly separate requirements; an anonymous informer's letter to police containing a statement that the defendants were engaged in drug trafficking and setting forth the defendants' arrangements for bringing a shipment of drugs from Florida to Illinois, together with the results of state and federal agents' investigation that corroborated several predictions in the informer's letter, provided a sufficient basis for the magistrate's probable cause finding * * *."

In scrapping the overly-complex Aguilar-Spinelli rule the Court stated, "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate has a 'substantial basis for . . . conclud[ing]' that probable cause existed. Jones v. United States, supra, 362 U.S., at 271. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli."

AGUILAR-SPINELLI (CONT.)

The Court declined to rule on the "good faith" exception to the exclusionary rule in this case because the issue had not been squarely presented in the courts below. However, a concurring opinion by Justice White, plus statements made by Justice Rehnquist in the majority opinion, give good reason to believe that a clear majority of the Court is favorably disposed to adopt the rule in an appropriate case. In declining to reach the good faith issue the Court actually apologized, apparently with an eye to the scores of amicus curiae briefs that had been filed on the issue, including one by NDAA: "We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it." Certiorari was granted on 6-27-83 in the following cases raising the good faith issue: Massachusetts v. Sheppard, 82-963; Colorado v Quintero, 82-1711; U.S. v. Leon, 82-1771. The issue should be settled in the next Term. NDAA has filed an amicus brief in these three cases, urging the Court to adopt a good faith exception to the exclusionary rule.

Dissents were registered in Gates by Justices Brennan, Marshall and Stevens, who are apparently concerned that the Court is continuing its trend of replacing outworn rules in the Fourth Amendment area with clear, concise guidelines for the police and courts to work with. Illinois v. Gates, 103 S.Ct. 2317, 33 CrL 3109 (June 8, 1983).

EDWARDS V. ARIZONA "INITIATION" RULE DISCUSSED AND APPLIED, BUT NOT CLARIFIED

In this case the Court had an opportunity to clarify the rule of Edwards v. Arizona, 451 U.S. 477 (1981) that custodial interrogation of an arrestee who has invoked his right to counsel must cease unless counsel has been provided or the suspect himself initiates further dialogue with police. A major problem with the Edwards rule has been what constitutes a defendant's "initiation." While a 5 Justice majority in the instant case was able to conclude that the defendant had waived his right to counsel, only 4 Justices were able to agree on the test to be employed in Edwards cases and its application in this case. The defendant had originally requested counsel, but then asked, "What is going to happen to me now?" The police engaged him in a conversation concerning where the defendant would be taken and what the charge would be. At the suggestion of the police the defendant took a lie detector test the next day, and then gave a confession. By the time that confession had been given, the defendant had been rewarned of his Miranda rights two times. The plurality Justices, in an opinion written by Mr. Justice Rehnquist, took the position that there must be a two-step inquiry in an Edwards-type case. First, it must

EDWARDS V. ARIZONA (CONT.)

be established that an "initiation" of dialogue took place at the behest of the defendant; and second, it must be demonstrated that the defendant waived his right to counsel. Here the defendant had clearly "initiated" further conversation. "Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the custodial relationship" A waiver of the defendant's right to counsel followed since he was properly advised of his rights after he had initiated the dialogue and the police had committed no impropriety.

Mr. Justice Powell concurred in the result only, declining to adopt a two-step analysis rule. He would simply hold that "the facts and circumstances, when viewed in their entirety, clearly establish a valid waiver of the right to counsel."

Justices Brennan, Blackmun and Stevens joined in a dissenting opinion written by Justice Marshall, in which the two-part analysis test was approved for Edwards-type cases, but the Justices were of the view that the statement made by the defendant in this case did not constitute "initiation" under Edwards because the defendant's question did not relate to the subject matter of the criminal investigation. Oregon v. Bradshaw, ___ S.Ct. ___, 33 Cr.L. 3211 (June 23, 1983).

SEARCH WARRANTS - SPECIFICITY REQUIREMENT - "ANY PERSON"

Where police officers had reason to believe that a robbery suspect had secreted the proceeds of the crime somewhere inside a house prior to his arrest there, it was proper for a search warrant to authorize a search of the house and "any person present" therein. The case was distinguished from Ybarra v. Illinois, 444 U.S. 85 (1979) which held that a warrant to search a tavern did not establish probable cause to search patrons. The warrant in this case itself authorized the search of unnamed persons in a specific place and was supported by probable cause to believe that these unnamed persons might be harboring contraband. The Court took the position that under the facts of this case, to require greater specificity as to the identity of the persons subject to search, and probable cause as to each one, would "excessively impede law enforcement efforts and invite criminal defiance of the law." U.S. v. Graham, 563 F.Supp. 149, (N.Y., 1983).

WARRANTLESS SEARCH - PUBLIC EMERGENCY EXCEPTION - ETHER - DESTRUCTION OF EVIDENCE

On the basis on a "bona fide public emergency" exception to the Fourth Amendment warrant requirement, the police were justified in conducting a limited warrantless search of an automobile trunk because a strong odor of ether was detected coming from the trunk, and the police were aware of the highly explosive nature of the substance. The Court took the position that the ether plainly constituted an immediate and serious public safety hazard, and the police acted responsibly in their efforts to eliminate the danger. The Court also had to deal with the issue of the destruction of the evidence by the police prior to trial on the recommendation of the fire department. While this prevented the defendant from conducting an independent analysis of the substance, the Court ruled that its destruction by the police was proper due to its hazardous nature. Other chemicals - gasoline, propane, and hydrochloric acid - found in the trunk were not as hazardous as ether, and their destruction by the police was improper and required suppression of the evidence as to their existence. People v. Clements, 661 P.2d 267, (Colo., 1983).

STRIP SEARCHES TRAFFIC ARRESTEES

No constitutional error occurred in the routine strip search of a young woman who was arrested pursuant to a warrant for failing to appear and pay parking tickets that she claimed she did not even know about. The Court noted that in this state it is customary to release minor traffic offenders on their own recognizance and to give petty offenders the chance to post bond, but in this case the plaintiff was strip searched pursuant to the county sheriff's policy of strip searching every person processed into the general jail population area, after she indicated that she would post bond. Such a strip search policy is justified for the protection of both guards and inmates from the danger posed by entry of weapons, drugs, and communicable diseases into the jail. Traffic arrestees enjoy no special privileges in this regard, since they "run the whole gamut of society," and can be searched like any other arrestees. Giles v. Ackerman, 559 F.Supp. 226 (Idaho, 1983).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - BACK SEAT OF POLICE CAR

There is no reasonable expectation of privacy while sitting in a police car after being arrested and told that the car would be used to take the defendant from a police station to a county jail. "Crowson [the defendant] and Romero [his confederate] obviously had a subjective expectation of privacy; otherwise they would not have made incrimi-

RIGHT TO PRIVACY (CONT.)

nating statements. The 'reasonableness' of Crowson's expectation of priacy, however, is ultimately a matter to common sense and practical judgement. * * * Here, Crowson had just been arrested at a neighborhood bar - a most extreme interference with the 'right to be left alone' - and remained in the custody of the police on the way to jail. Objectively, he surely had no reason to suspect that his conversation with a suspected accomplice in the back of the police car would be afforded any kind of confidentiality. Under these circumstances, we conclude that Crowson did not have a reasonable expectation of privacy." The Court approved the surreptitious electronic monitoring of incriminating statements made by the defendant and his confederate while sitting in the back seat, even though the monitoring was obviously set up by the police for the purpose of overhearing the conversations. People v. Crowson, 660 P.2d 389 (Cal., 1983).

MIRANDA - INTERROGATION - FUNCTIONAL EQUIVALENT - CONFRONTING DEFENDANT WITH EVIDENCE

Where the police placed stolen merchandise outside a defendant's jail cell, this was not the functional equivalent of interrogation under Miranda, even though the police officer admitted that he placed the stolen merchandise outside the defendant's cell in order "for him to tell what happened." The Court took the position that just because the police alerted the defendant to their possession of evidence of the robbery did not necessarily constitute coercion. The test to be employed in determining whether police conduct constitutes action "reasonably likely" to elicit a response from the defendant focuses on the perception of the defendant, not the police. The real reason for the defendant's statement after being confronted with the evidence was his knowledge that his two accomplices knew of his involvement and were likely to inform the police of it, since the evidence had been recovered from the home of one of the defendant's accomplices. People v. Ferro, 460 N.Y.S. 2d 585 (N.Y. App., 1983).

VIDEOTAPE OF CRIME SCENE - ADMISSIBILITY AT TRIAL

Prosecutorial use of a videotape to show a jury the site of a reckless homicide offense was approved in State v. Schlickenmayer, 334 N.W.2d 196 (N.D., 1983). The defendant was charged with causing a woman's death by leaving her on a lonely highway in subfreezing weather, and his defense was that the victim was largely to blame because she failed to seek obvious sources of shelter. The videotape showed an eight-mile stretch of highway between the point where the victim was put out of the defendant's car and the place

VIDEOTAPE - (CONT.)

where her frozen body was found. The videotape showed both straight-ahead views of the highway, as well as full circle views, and several farms and buildings were visible in the pictures. The tape was found by the trial judge to be a reasonable representation of the road - which is the same rule that is applied to the admission of photographs - and the defendant was properly permitted to introduce pictures of anything that could be seen from the road.

WITNESS - PREHYPNOSIS MEMORY - ADMISSIBILITY

The Supreme Judicial Court of Massachusetts has held that even though testimony by a witness regarding memories that were recalled only following hypnosis is generally inadmissible in a criminal trial, the witness may testify as to what he could remember prior to hypnosis, if the trial court limits the testimony to the witness's prehypnotic memory of events, and opposing counsel has an opportunity to demonstrate to the jury that the witness has been subjected to hypnosis. The party who introduces prehypnosis memory testimony bears the burden of establishing exactly what the witness recalled prior to being hypnotized, and any ambiguity is to be resolved in favor of the opposing party. Also, in such cases, opposing counsel must be permitted to bring out the possible effect of hypnosis on memory, and special jury instructions regarding hypnosis may be necessary. Commonwealth v. Kater, 447 N.E.2d 1190 (Mass., 1983).

"Ladies and gentlemen of the jury, you have heard the evidence in this case and can now do one of two things — acquit the defendant, or sock it to him!"

PROSECUTION STANDARDS FOR CHILD SEXUAL ABUSE CASES

YELLOWSTONE COUNTY ATTORNEY'S OFFICE

July 1983

I.

PURPOSE

A. Primary: To apply criminal and civil sanctions to reported incidents of sexual abuse to children to insure the protection of the victim from further abuse.

B. Secondary: To develop interdisciplinary procedures that will encourage timely reporting, develop a complete criminal, medical, and social investigation, insure treatment for the victim, and establish a valid system to evaluate offenders for sentencing; and to develop guidelines for those who are appropriate for sentencing to a community-based program as an alternative to state prison.

COMMENT

In those cases where the victim is known to the offender and there is a familial relationship, i.e., father-child, stepfather-child, there develop strong pressures against reporting the crime. There is intimidation (subtle to direct) directed to the victim and other persons, including the mother of the child who would normally be expected to support and protect the victim. One of the more destructive aspects is the transfer of guilt from the offender to the victim which negates even older victims from reporting the crime. When the crime is reported, oftentimes the victim and other family members try to protect the offender and then become uncooperative witnesses.

The perception that all offenders will be sentenced to long prison terms becomes a major deterent to reporting and witness cooperation. This proposal is an attempt to establish clear guidelines for handling these cases through alternative sentencing and therefore reduce this resistance to reporting and witness cooperation.

Offender treatment is of value in some situations, but the inability to make accurate predictions about re-offending requires that offender treatment can be only one factor, not the basis for alternative sentencing. The approach of viewing the interdiction of ongoing sexual abuse and the protection and treatment of the victim as the primary focus of the prosecutor's office, with the punishment of the offender being interfaced with and supportive of that objective, hopefully will produce more predictable results and minimize those cases that will actually go to trial.

II.

STATE PRISON RECOMMENDATION

A. The sentence recommendation for all offenders, except as to those meeting the criteria outlined in paragragh III, will be a minimum of five (5) years in the Montana State Prison.

B. Depending on the aggravating circumstances that exist surrounding the offense or the offender the minimum recommended sentence will be increased.

C. When any of the following exist the minimum recommended sentence will be 10 years.

(1) injury to victim
(2) multiple victims
(3) psycosis or other mental disorder
(4) victim unknown to offender
(5) prior sexual offenses

III.

CRITERIA FOR CONSIDERATION IN ALTERNATIVE SENTENCING

A. The offender must execute a release of all medical, hospital, or other treatment records.

B. Complete psychological evaluation and report.[1/] Law enforcement report and social history will be obtained. Those offenders will be excluded from consideration for alternative sentencing when:

(1) The offender is exclusively sexually orientated towards children instead of adults;

(2) The offender is a predator who seeks out victims, as distinquished from the situational offender;

(3) The offender lacks a profound sense of guilt for the molestation;

(4) The offender does not accept full responsibility for the abuse;

(5) The offender has a history of violence, or heavy drug use, or prior verified sexual offenses even though the offense may not have been prosecuted, or a long criminal record, or a serious mental disorder.

(6) The offender has inflicted physical injury on the victim;

[1/] Independent evaluation may be required whenever the psychologist or psychiatrist recommends treatment in a program in which he has a proprietory interest. The psycologist or psychiatrist must be qualified in the area of sexual abuse. The county attorney's office in conjunction with the sexual abuse task force will develope a list of "approved" mental health professionals for alternative sentencing evaluations and reports.

(7) There is no valid indication that the conduct will not be repeated, and the safety of the victim and family cannot be reasonably assured;

(8) There is little or no prognosis for treatment.

C. Other factors considered for alternative sentencing:

(1) How good is the case from a prosecution standpoint?

(2) What is the mother's attitude? Will she insure that "no contact" orders are enforced?

(3) What effect will a trial have on the victim?

(4) At what point in the investigation did the offender accept full responsibility for the offense(s)?

(5) The offender did not leave the home and agree to no contact.

(6) What is the recommendation from the Sexual Abuse Task Force or other professionals?

VI.

MINIMUM REQUIREMENTS FOR A RECOMMENDED SENTENCE OTHER THAN STATE PRISON:

A. Five years suspended, will be requested in all cases. The time will be extended depending on the requirement for control;

B. Some county jail time. Consideration will be given to work release and/or weekends to allow the offender to maintain employment;

C. No contact, except as allowed by the court;

D. A specific treatment program will not be ordered: however, the offender will be required to submit a proposal plan which will be reviewed by the sexual abuse task force. 2/

E. Usual probationary terms;

F. Special conditions will be structured to insure protection of victim and other children based on recommendations from the Child Protective Services and the Sexual Abuse Task Force;

2/ The sexual abuse task force will be requested to review treatment programs in this community and in other jurisdictions and make recommendations to the county attorney and the court regarding the effectiveness of specific programs.

G. "No contact" conditions can be modified only by request to the court through the probation officer with the approval of the child protective services. Such request must contain a report by the Sexual Abuse Task Force based on a current psycological evaluation to determine the present ability of the offender to exercise sufficient control to avoid remolestation of the victim under the circumstances to be permitted under the proposed modification.

COMMENT

The public has a right to demand credibility from any sentencing scheme that does not remove the sexual offender from the community. It is unrealistic to expect judges to follow alternative sentencing recommendations unless there is strong evidence that the victim will, in fact, be protected and that other children will not be put at risk. It is for that reason the alternative sentencing is based on protection rather than offender treatment, which given the present state of the art is speculative at best. This is in no way intended to be judgemental regarding a treatment plan for a specific offender, rather, it is intended to minimize the risk of accepting the offender who takes treatment only to avoid the legal consequences of his conduct.

V.

TEMPORARY INVESTIGATIVE ORDER

A. When used, the TIA will be fully integrated with the criminal investigation/prosecution.

B. A TIA will be secured in all cases where the non-offending spouse is not supportive of the victim, there is injury, long-term abuse, or the child is removed from the home.

C. In those situations where there is a clear indication of sexual abuse, but the case is not prosecutable, the protection of the victim will be maintained through the TIA or petition for temporary or permanent custody. Every effort will be made to track the offender regarding the potential for involvement with other children, particularly in a family setting. (Requires coordination between Social Rehabilitation Services and Probation.)

D. A guardian ad litem will be requested in all cases where a TIA is obtained.

VI.

INTERNAL PROCEDURES

A. Consistant with the overall prosecution needs of the offices, one attorney will be assigned primary responsibility for the supervision of sexual abuse cases involving children.

B. Because of the multi-disciplinary requirements in these cases, a para legal or coordinator is a projected need. This person can be assigned either to the Welfare or the County Attorney; however, the ultimate responsibility is to the prosecutor for case preparation.

VII.

PUBLIC INFORMATION

A. Accurate information must be made available to the general public. Unless the present attitudes of incarcerating all offenders can be modified, there is little hope of actually implementing the objectives of these standards. Just as in other cases of child abuse, the longer the abuse continues, the level of harm to the child continues and increases; and the prognosis for effective treatment becomes more guarded.